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No. 922

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., its officers, members and employees, and GEORGE GERMAN, individually and as President of LOCAL 1422 of THE INTERNATIONAL LONGSHOREMEN'S UNION, A.F.L.-C.I.O., BRUCE BENNETT, LOUIS JOHNSON, WILLIE DAVIS, L. BAXLEY and ZACHARIAS FAILEY,

APPELLANTS

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, a body corporate and politic

APPELLEE

APPEAL FROM THE SPECIALLY DESIGNATED THREE-JUDGE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS

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WALKER, EVANS & COGSWELL CO.—Printers of Distinction Since 1821—CHARLESTON, S. C.

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OPINIONS BELOW

The order and opinion below are incorporated in the Appellants' Jurisdictional Statement, Appendix A, pp. 1a-3a. The opinion below is reported as *South Carolina State Ports Authority v. Local 1422 of The International Longshoremen's Union, AFL-CIO, et al.*, 191 F. Supp. 156.

STATUTES INVOLVED

The statutes involved are:

(1) 28 U.S.C. 1447 (d);

(2) 28 U.S.C. 1253.

Section 1447 (d) of 28 U. S. C. is as follows:

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

Section 1253 of 28 U. S. C. is as follows:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

STATEMENT OF THE CASE

This is an appeal from an order of a District Court of three judges remanding this case to the State court from which it was removed by appellants.

Appellee, the South Carolina State Ports Authority, created by statute as an instrumentality of the State of South Carolina, maintains and operates state-owned docks, warehouses and terminal facilities at Charleston, South Carolina. On December 8, 1960, appellants picketed certain of appellee's facilities at Charleston causing disruption of its operations. On the same day, appellee brought this action in the State court alleging a common law conspiracy by appellants resulting in illegal and damaging interference with appellee's operations, and sought and obtained a temporary restraining order from the State court which halted the picketing.

Thereafter, appellants removed the case to the United States District Court on the ground that the appellee's action is one arising under the laws of the United States. Following the removal of the case, appellants filed an amended answer and counterclaim alleging, among other things, that the statute creating the appellee is unconstitutional, and that the State court injunction should be vacated by a three-judge District Court because appellee's remedy was exclusively before the National Labor Relations Board.

Appellee thereafter moved to remand the case from the United States District Court to the State court on the ground that its action is brought under the common law of the State of South Carolina and does not arise under the constitution or laws of the United States.

Since appellants had asked in their counterclaim in the United States District Court for an injunction against enforcement of the State statute under which appellee operates, a special three-judge court was convened under 28 U. S. C., 2281 et seq. The three-judge court so convened heard and passed upon only the appellee's motion to remand the case to the State court, and did not reach or pass upon the other matters set forth in the appellants' answer and counterclaim and motions, and its order and opinion are only to the effect that the case was improvidently removed from the State court, and it only ordered that the case be remanded to the State court.

MOTION TO DISMISS

Appellee moves this Honorable Court to dismiss the appeal upon the following grounds:

(a) The order appealed from is an order remanding the case to the State court from which it was removed and is not reviewable on appeal or otherwise because

of the provisions of Section 1447 (d) of 28 U. S. C., and

(b) The order appealed from is not appealable to this court under Section 1253 of 28 U. S. C. because it is not an order granting or denying an interlocutory or permanent injunction.

ARGUMENT

I

The order appealed from is not reviewable by appeal or otherwise because of Section 1447 (d) of 28 U. S. C.

Section 1447 (d) of 28 U. S. C. provides:

"(d) On order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

The order and opinion below (Appellants' Jurisdictional Statement, Appendix A, pp. 1a–3a) from which appellants have appealed operates only to remand the case back to the State court from which appellants removed it. The three-judge District Court, which was convened at the instance of appellants, heard only appellee's motion to remand the case to the State court, and said court considered only the motion to remand, and did not reach and consider the other claims and questions set forth by appellants in their answer and counterclaim and motions. The District Court properly considered only whether or not appellee's complaint stated a cause of action arising under the laws of the United States, and finding that it did not, concluded that the District Court was without jurisdiction of the case and ordered it remanded to the State court.

This court has often held that a District Court order remanding a case to the State Court from which it was removed is not appealable.

Kloeb v. *Armour & Co.*, 311 U. S. 199, 61 S. Ct. 213, 85 L. Ed. 124 (1940);

Metropolitan Casualty Ins. Co. v. *Stevens*, 312 U. S. 563, 61 S. Ct. 715, 85 L. Ed. 1044 (1941);

United States v. *Rice*, 327 U. S. 742, 66 S. Ct. 853, 90 L. Ed. 982 (1946);

Aetna Casualty & Surety Co. v. *Flowers*, 330 U. S. 464, 67 S. Ct. 798, 91 L. Ed. 1024 (1947).

In Aetna Casualty & Surety Co. v. *Flowers*, 330 U. S. 464, 466, 67 S. Ct. 798, 799, this court said:

> "An order of a District Court remanding a cause to the State court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here." (Citing authorities)

Appellants contend that the effect of the District Court order remanding the case to the State court is to deny their application for an injunction against the State statute under which appellee operates, and to deny their motion to dismiss appellee's complaint. The answer to this is that the order of remand merely denied that the United States District Court had jurisdiction of the case and sent it back to the State court unaffected, for further proceedings there. Appellants still retain all of the defenses that they have advanced in their answer and counterclaim and motions, and the right to pursue the same in the State courts.

II

The order appealed from is not appealable under Section 1253 of 28 U. S. C.

Section 1253 of 28 U. S. C. provides:

> "Except as otherwise provided by law, any party may

appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges."

It is respectfully submitted that the order of remand appealed from here is not "an order granting or denying an interlocutory or permanent injunction" and that hence the order is not appealable to this court. As stated above, the order appealed from is simply an order remanding the case to the State court on the ground that it had been improvidently removed to the United States District Court and that the latter Court had no jurisdiction of the case. The District Court did not reach for consideration appellant's application for an injunction against the State statute under which appellee operates and certainly its order remanding the case to the State court did not *deny* the injunction sought.

Appellants cite *Florida Lime and Avocado Growers v. Jacobsen*, 362 U. S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568, to support their contention that this court has jurisdiction of their appeal in this case. However, it is respectfully submitted that the cited case is entirely distinguishable and different from the present case. In *Florida Lime and Avocado Growers v. Jacobsen, supra*, the complaint sought to enjoin the enforcement of the State statute alleged to be unconstitutional. The three-judge District Court that heard the case considered the constitutionality of the statute and dismissed the action. This Court allowed the direct appeal that was made from the dismissal of the action by the three-judge District Court. Since the three-judge District Court dismissed the action, it necessarily had to deny the injunction that was sought and hence the right of direct appeal under 28 U. S. C., Section 1253 lies. But in the present case, there was not a dismissal of the action

(or denial of appellants' application for injunction), but simply a remand of the case to the State court, which preserves all of the rights and claims of the parties, and which only changed the forum of the action back to the State court where it was originally commenced.

CONCLUSION

For the reasons herein assigned, it is urged that the appeal be dismissed.

Respectfully submitted,

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